IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 41

A. L. MECHLING BARGE LINES, INC., et al.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

THE PENNSYLVANIA RAILROAD COMPANY, et al.,
Intervening Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division.

BRIEF

OF THE INTERVENING RAILROADS-APPELLEES

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JURISDICTION.

This action was brought to enjoin and set aside an order of the Interstate Commerce Commission, and for a declaratory judgment as to the powers of the Commission. The decree of the three-judge District Court dismissed the case as one presenting no controversy (R. 64-65). An appeal was taken to this Court on October 21, 1960 (R. 65-67). On April 3, 1961, the Court ordered that further consideration of the question of its jurisdiction be postponed to the hearing on the merits.

QUESTIONS PRESENTED.

1. Whether the court below erred in concluding that the proceeding should be dismissed as no longer presenting a justiciable controversy in view of the appellee railroads' Chicago-to-the-East reduced rates and withdrawal of their application for Fourth Section relief.

2. In the event that the first question is answered in the affirmative—

A. Whether an application for declaratory relief may properly be made to a three-judge court established pursuant to the Urgent Deficiencies Act.

B. Whether appellants have exhausted their administrative remedies against the injuries of which they complain.

3. In the event both prior questions are answered in the affirmative—

A. Whether a hearing is a prerequisite to the Commission's issuance of an order granting relief from the long-and-short haul provisions of Section 4(1) of the Interstate Commerce Act.

B. Whether a temporary Fourth Section order is invalid unless it contains findings.

STATUTES INVOLVED.

Sections 4(1), and 13(1) of the Interstate Commerce Act (49 U.S.C. §§ 4(1) and 13(1)), and Section 4(b) of the Administrative Procedure Act (5 U.S.C. § 1003(b)) are reproduced in the Appendix.

STATEMENT OF THE CASE.

Prior to the granting of the application here in issue, the Western railroads had in effect local rates from Northern Illinois grain producing area to Chicago. The railroads operating east of Chicago also had in effect reshipping rates from Chicago to the East (R. 3-4). These proportional rates from Chicago normally would be combined with the rates from northern Illinois to form through combination rates from origins in northern Illinois to destinations in the East. However, because of the long-and-short-haul provision of Section 4 of the Interstate Commerce Act, the reshipping rates were subject to the restriction that the through combinations could be no lower than the local rates from Chicago to the involved destinations (R. 304). Amounts necessary to increase the through combinations to the level of the Chicago-to-the-East local rates were added to the reshipping rates.

In December 1958, the railroads published, to become effective January 10, 1959, tariffs which would permit the use of the Chicago reshipping rates in combination with the rates into Chicago without observing the level of the local rates from Chicago as minima for the through rates (R. 4).[1] Since the local rates from Chicago were higher than these combination through rates and would be in

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[1] In *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, the Court required that these reshipping rates apply on grain arriving at Chicago by barge. The Court announced (p. 577):

> "Concretely, the provisions mean in this case that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge grain than for carrying ex-lake or ex-rail grains to and from the same localities. * * *"

These tariff provisions permit the Eastern railroads to charge for their transportation services from Chicago to the East the same rates on grain arriving at Chicago by rail as they are required, by *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 to charge for grain arriving at Chicago by barge which originates in the same Northern Illinois origin territory.

violation of Section 4 of the Act, the involved Fourth Section applications were filed seeking authority to maintain higher rates from intermediate points than the published combination through rates from the more distant points (R. 5). The original verified application of 37 pages set forth the bases for the relief sought, including facts to demonstrate that the rates were reasonably compensatory. Written protests were filed by interested shippers and barge lines, including the present appellants (R. 5). However, on January 9, the Commission refused to suspend the tariff publication, instituted an investigation into the reasonableness of the through combination rates, and issued the Fourth Section Order No. 19059—the temporary order here at issue—pending a hearing to determine whether further continuing relief should be granted (R. 6-7). Applicants filed with the Commission a petition for reconsideration and vacation of Fourth Section Order No. 19059. On March 10, 1959, that petition was denied (R. 22). On February 18, 1959, the Commission assigned for hearing on March 16, 1959, the matters involved in Fourth Section Application No. 35140. After several postponements made at the request of the parties, a hearing was held on July 7, 1959, through July 16, 1959 (R. 7). On September 1, 1959, the rail carriers petitioned for further hearing and consolidation with two additional Fourth Section Applications which involved the same relief from additional origin points (R. 9-10). Appellants opposed the request for consolidation and further hearing (R. 9). By order dated October 28, 1959, the Commission granted the petitions of the rail carriers (R. 27-28).

In November 1959, while this matter was still pending before the Commission, applicants brought this action in the District Court (R. 1-13). The action sought (1) to enjoin, set aside, annul and suspend the fourth section order of the Commission; and (2) to enter a declaratory judgment upon certain questions of law (R. 12-13).

On March 28, 1960, applicant railroads advised the Commission and all interested parties that they had established, effective March 10, 1960, reduced local rates Chicago-to-the-East which made unnecessary the relief granted by Fourth Section Order No. 19059, as supplemented (R. 45-46).[2] By notice dated March 31, 1960, the Commission advised that the applications were considered withdrawn (R. 48). There are therefore no longer outstanding Fourth Section departures and the temporary Fourth Section authority and Fourth Section Order No. 19059, as supplemented, are no longer effective. Following this reduction in the local rates and the acknowledged withdrawal of the applications, both appellees filed motions to dismiss on the grounds that the issues were moot and that declaratory judgment relief would not lie (R. 40-49).[3] The court concluded that the cause of any controversy that existed had been terminated by the publishing of rates which fully conformed in all respects to the requirements of Section 4 of the Interstate Commerce Act (49 U.S.C. § 4) and dismissed this action (R. 64-65).

[2] The published reduced local rates Chicago-to-the-East were protested by Appellants. Appellants alleged that the reductions were made to avoid the necessity of obtaining Fourth Section relief. That this was the reason for the reduction the rail carriers did and do emphatically deny. The Chicago-to-the-East rate reductions were forced by truck competition.

[3] On June 25, 1960, appellants filed, with the lower court, their Motion for Summary Judgment. This motion was filed more than two months after the filing of and one day prior to oral argument on the motions to dismiss. Because of the pending motions to dismiss, the appellants' motion, with appended affidavits, was never considered by the court or the appellees. For the same reason no counter affidavits were filed.

ARGUMENT.

SUMMARY OF ARGUMENT.

I.

A. Appellants' prayer for an injunction to enjoin, set aside, annul and suspend Fourth Section Application No. 19059 has become moot, since the subsequent rate publications by appellee railroads removed all Fourth Section violations, and the applications for relief were formally withdrawn. See, *e.g.*, *Atchison, Topeka & S. F.* v. *Dixie Carriers*, 355 U.S. 179.

B. Similarly, appellants' prayer for a declaratory judgment now lacks any "actual controversy." No "declaration" could now deal with other than an abstract proposition and a hypothetical, academic case. See *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227. Moreover, declaratory relief is improper in any event, in light of the provisions of the Urgent Deficiencies Act providing the sole statutory method of review of orders of the Interstate Commerce Commission. See *Public Service Comm'n of Utah* v. *Wycoff*, 344 U.S. 237.

C. In any event, appellants have no justiciable interest in this proceeding, since they are directly affected, not by the order granting temporary Fourth Section relief, but only by the Commission's conclusion that it would not suspend the rates published to become effective on January 10, 1959. Plaintiffs have failed to initiate or to exhaust the appropriate statutory remedies available to them to challenge this latter action by the Commission. See *United States* v. *Merchants & M. Traffic Ass'n*, 242 U.S. 178, 188; *Seatrain Lines, Inc.* v. *United States*, 168 F. Supp. 819 (S.D.N.Y. 1958).

II.

On the merits, plaintiffs' complaints are groundless. Their contention that the Commission must, in addition to making an investigation, have a formal hearing, is sustained neither by the Administrative Procedure Act nor by Section 4(1) of the Interstate Commerce Act. *Seatrain Lines, Inc.* v. *United States, supra.* The latter section, in contrast to other sections of the Interstate Commerce Act which condition Commission action upon hearing, permits Commission action "after investigation". Moreover, this has been the consistent construction of the section by the Commission over many years. *Cf. New Haven R.R.* v. *Interstate Commerce Commission,* 200 U.S. 361, 401-402.

Appellants' further contention that the Commission order is invalid because it lacked findings, fails for the same reason, since Section 8(b) of the Administrative Procedure Act upon which they rely does not apply except in cases where a hearing is required to be held.

Finally, appellants' contention that they have been denied due process ignores the fact that they have adequate administrative remedies, including the right to a hearing under other sections of the Act, which they have elected not to invoke. *United States* v. *Merchants & M. Traffic Ass'n, supra.*

Since the Court has postponed consideration of the question of its jurisdiction to the hearing of the case, we first address ourselves to that topic. Thereafter, however, we shall consider the several other grounds which may be relied upon to support the conclusion reached by the court below that the action should be dismissed.

I.

The Court is Without Jurisdiction of This Matter Since There is No Justiciable Controversy Before It.

Appellants seek to sustain the jurisdiction of this Court both with respect to this prayer for injunctive relief, and with respect to their prayer for a declaratory judgment. They are, we submit, in error in both respects.

A. The Issue of Injunctive Relief Has Been Rendered Moot by Changed Circumstances.

Appellants' prayer for injunctive relief sought an order which would enjoin, set aside, annual and suspend Fourth Section Order No. 19059 of the Interstate Commerce Act. This order was permissive only, *United States* v. *Merchants & M. Traffic Association,* 242 U.S. 178, and permitted the railroads to maintain higher rates at intermediate points. The March 10, 1960 rate publications by appellee railroads removed all Fourth Section violations, and, coupled with the withdrawal of the applications, made inoperative and terminated the relief afforded by the Fourth Section orders. *Vicksburg, Shreveport & Pac. Ry.* v. *Anderson-Tully Co.,* 256 U.S. 408; *Lime From C.F.A. Terr. & S.W. to Boute, La.* 294 I.C.C. 616, 618 (1955); *Maggioni & Co.* v. *A.C.L. R.R.,* 272 I.C.C. 127, 131 (1948). Thus, the orders which appellants seek to enjoin have ceased to be effective and cannot be reinstated; and the issue of an injunction has been rendered moot. *Amalgamated Asso.* v. *Wisconsin Emp. Rel. Bd.,* 340 U.S. 416; *United States* v. *Alaska Steamship Co.,* 253 U.S. 113; *Coastwise Line* v. *United States & Interstate Commerce Commission,* 157 F. Supp. 305 (1957); In three recent cases, the Court has dismissed appeals as moot for substantially similar reasons. *Atchison, Topeka & Santa Fe Railway Co.* v. *Dixie Carriers,* 355 U.S. 179;

United States v. *Amarillo-Borger Express*, 352 U.S. 1028; and *Luckenbach Steamship Company, Inc.* v. *United States*, 364 U.S. 280.

Indeed, appellants have themselves recognized this. Paragraph 19 of their complaint, wherein they admit that "It is possible that the entry of a final order in Fourth Section Application No. 35140 may make this case moot before a final determination of these issues by the Supreme Court of the United States can be obtained, just as other cases in which similar relief has been sought have become moot before the issues could be determined by the Supreme Court." (R. 12-13). Withdrawal of the applications and the termination of their effectiveness in no less measure brings finality to the subject matter.

B. *Appellants Do Not Have a Valid Basis for Declaratory Relief.*

Appellants are no more successful in their contention that they are still entitled to a declaratory judgment. The questions which appellants seek to make the subject of a declaratory judgment do not involve an actual controversy. Regardless of whether an "actual controversy" had existed with respect to the particular commission action here under review, the controversy terminated upon the withdrawal of the applications and discontinuance of the temporary authority. No "declaration" which the courts could now make would affect the dispute which has now terminated. It is clear that the Court will not decide moot questions or abstract propositions for the government of future cases which cannot affect the result as to the matter in issue in the case before it. *Poe* v. *Ullman*, 367 U.S. 497, 508; *Local No. 8-6, Oil, Chemical & Atomic Wkrs.* v. *Missouri*, 361 U.S. 363; *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237; *Amalgamated Association* v. *Wisconsin Emp. Rel. Bd.*, 340 U.S.

416; *United States* v. *Alaska Steamship Co.*, 253 U.S. 113; *Mills* v. *Green*, 159 U.S. 651; and *California* v. *San Pablo & T.R. Co.*, 149 U.S. 308.

In *Aetna Life Insurance* v. *Hayworth*, 300 U.S. 227, the Court said (p. 240):

> "A 'controversy' in this sense must be one that is appropriate for judicial determination. • • • A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot."

Just as a lack of a subject matter renders moot the prayer for an injunction, the same lack is equally fatal to a declaratory judgment proceeding.

It would serve no useful purpose to discuss in detail the cases to which appellant refers (pp. 17-22), which involve situations in no way comparable to the present one. Suffice it to say, that each of them point up the basic element lacking in this proceeding: *i. e.*, a subject matter to which either an injunction or declaratory order could attach. In the only two involving the Interstate Commerce Commission—*Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, and *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U.S. 433,—the problem was wholly different. Each involved maximum rate orders of the Commission. By statute, at that time, orders of the Commission were limited to a two-year duration. It was the practice of the Commission, when necessary, to reinstate the order after two years. The Court pointed out that consideration of such an issue ought not to be, as they may be, defeated by short term orders, capable of repetition. In those cases, the very subject matter, *i. e.*, the same involved rate, was likely of being the subject of recurring orders unless the railroads continued to maintain the rates prescribed. This,

of course, is not the case here. There is no likelihood that the local Chicago-to-the-East rates will be increased.

Moreover, there is an independent basis upon which declaratory relief, even if appropriate, must be denied. The provisions of the Urgent Deficiencies Act, 28 U.S.C. §§ 1336, 2284, 2321-25, provide for the sole statutory method of review of the here involved orders of the Interstate Commerce Commission. The Declaratory Judgment Act, 28 U.S.C. § 2201-2202, cannot be interposed as an alternative method of relief. *Magnolia Petroleum Co.* v. *Texas Illinois Nat. Gas P. Co.*, 130 F. Supp. 890 (D.C., S.D. Texas, 1948). In *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237, 246, the Court commented "Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review". As the Court recognized, the Senate Judiciary Committee, in recommending Rule 57 of the Federal Rules of Civil Procedure to provide procedures for the declaratory decree, noted (page 243) "A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case."

C. *Appellants Have No Justiciable Interest In The "Higher Rates" From The Intermediate Points, and Have Failed to Exhaust Their Proper Administrative Remedy.*

Appellants assert that the matter of the validity of the temporary Fourth Section order is not moot since, they contend, it stands as a bar to any action for damages in a suit under Section 8 of the Interstate Commerce Act (49 U.S.C. § 8). Section 4 of the Act (49 U.S.C. § 4) declares that "it shall be unlawful . . . to charge . . . any greater compen-

sation . . . for a shorter than for a longer distance . . ." The water carriers' concern is not with the higher rates at the intermediate points, but the rates at the more distant points. Any attack against the latter rate is not under Section 4, but must be under some other sections of the Act. This Court pointed out many years ago in *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 567, that the railroads could have reduced the rates from the intermediate points, rather than seek Fourth Section relief. This was, in fact, what was ultimately done. Regardless of which alternative is followed, appellants are placed in the same competitive situation, for they are interested only in the reduced rate from the more distant points. Appellants are not really directly affected by the order granting temporary relief; what really affected them was the Commission's conclusion not to suspend the rates published to become effective January 10, 1959 (R. 4). See *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 495 (D.C. Virginia 1935). The effect of these rates upon appellants is not a matter for consideration under Section 4 of the Act (49 U.S.C. § 4). *Seatrain Lines, Inc.* v. *United States*, 168 F. Supp. 819, 824 (S.D. New York, 1958).

For this reason, the applicant carriers are the only necessary parties to the Section 4 proceeding. All others are not bound by the orders entered, for they have ample remedy available under Sections 13 and 15 of the Act (49 U.S.C. §§ 13, 15). See *United States* v. *Merchants & M. Traffic Ass'n, supra*, 188. The Court there noted (*ibid.*):

> "And if the rates made by tariffs filed under the authority seem to them [other participants] unreasonable, or unjustly discriminatory, §§ 13 and 15 afford ample relief."

Seatrain Lines, Inc. v. *United States, supra*, page 825. Since the rates became effective, January 10, 1959, ap-

pellants have not seen fit not to impose the appropriate and exclusive remedy by filing a complaint directly assailing the lawfulness of the reduced terminal rates. In *Seatrain Lines, Inc.* v. *United States, supra*, the court considered this very point, and stated (page 824):

> "Thus insofar as the plaintiff claims discrimination against it resulting from new authorized rates, it has not exhausted its administrative remedies because it has not petitioned for a hearing under Sections 13 and 15 at which such claims would be determined.
>
> • • •
>
> "All questions as to the effect of the rates upon competing carriers, shippers, and affected communities are reserved for determination in proceedings under Sections 13 and 15, where a 'hearing' is expressly required."

Plaintiffs' failure to initiate and exhaust the appropriate statutory remedy must stand as a bar to the relief sought by this appeal. Cf. *United States* v. *Illinois Central R. Co.*, 291 U.S. 457.

In *Texas and Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 638, this Court stated, with reference to Section 4, Part I, of the Act:

> "The Act was passed for the protection of those who pay or bear the rates. The standards it establishes are transportation standards, not criteria of general welfare."

The water carriers, as such, are not shippers who pay or bear the charges, nor do they represent shippers at the intermediate points which may be affected by the higher rates applicable from those points.

II.

The Action of the Commission in Granting Section 4 Relief Was in any Event Proper.

Appellants cannot, and do not complain that they were not afforded an opportunity to make their views known to the Commission prior to the issuance of the order of which they complain. Indeed, the complaint alleges (R. 5) the filing of numerous protests and petitions by barge lines and shippers, and the filing of responses by the railroads. Rather, appellants' complaint is that the Commission did not accord them a formal hearing—and make findings—prior to the granting of relief from the long-and-short-haul provisions of Section 4(1) of the Interstate Commerce Act.

The Administrative Procedure Act makes it clear that the action of the Commission was an exercise of its "rule-making" function. Section 2(c) of that Act (5 U.S.C. § 1001(c)) defines rule-making as including the process for the "approval or prescription for the future of rates." *Seatrain Lines, Inc.* v. *United States, supra*, 826. Section 4(b) of the Administrative Procedure Act (5 U.S.C. § 1003(b)) provides as follows:

> "Procedures—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an

> agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection."

Thus, if no hearing is specifically required by Section 4(1) of the Interstate Commerce Act, relief may be authorized by the Commission, in its discretion, without a hearing.

Section 4(1) of the Interstate Commerce Act (49 U.S.C. § 4(1)) insofar as herein pertinent, provides:

> "That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances * * *, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section * * *"

The "investigation" specified does not impose the requirement of a hearing before authority is granted. This precise question was before the court in *Seatrain Lines* v. *United States*, 168 F. Supp. 819-828 (S.D. New York 1958):

> "Those protesting a Section 4 application may be given an opportunity to present written data, views and arguments as they were permitted to do here as part of the 'investigation' contemplated by the section. But there is no 'hearing' required * * *."

In arriving at this conclusion, the court noted the contrasting language of the second subdivision of Section 4 (49 U.S.C. § 4(2)) which relates to the increase of rail rates subsequent to a reduction to meet water competition, expressly provides that rail carriers "shall not be per-

mitted to increase such rates unless after hearing it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition." This distinction between "after investigation" and "after hearing" is carried out throughout the entire act. The specific imposition of a hearing prior to Commission action is illustrated by Sections 1(14), 1(21), 3(1a), 5(1), 5(2), 5(7), 5(15), 13(a), 15(3), 15(6), 15(7) and 16(1). In other words, when Congress sought to impose a requirement of a hearing, it did so in so many words. It did *not* do so in Section 4(1).

Moreover, the Commission has consistently, over many years, construed Section 4(1) as not requiring a hearing. As early as March 3, 1923, the Senate requested information from the Commission with respect to applications under Section 4. The Commission's response (set forth in *Administration of Section 4 of the Interstate Commerce Act*, 87 I.C.C. 564 (1924), was as follows:

	Heard	Not Heard	Total Applications
Applications granted in whole or in part after investigation, entirely disposed of:			
Decided prior to February 28, 1920, the date Section 4 was amended by the transportation act	234	4,791	5,025
Decided on and after February 28, 1920 (except applications granted to meet water competition)	66	484	550
Applications granted on and after February 28, 1920, after investigation, to meet water competition	3	1	4

In the year ending June 30, 1959—the year in which the applications here involved were granted—828 orders were entered by the Commission, of which 59 were denial orders, 66 were orders granting temporary relief, and 703 were orders granting continuing relief. A total of 33 involved a hearing. 73d Annual Report of the Interstate Commerce Commission, Fiscal Year Ending June 30, 1959. As the Court has frequently recognized, the construction placed by the Commission on a statute of which it is charged with enforcement is entitled to great weight. This is particularly true where, aware of the administrative interpretation, Congress has reenacted the statute without alteration in the particulars construed. See *New Haven R.R.* v. *Interstate Commerce Commission*, 200 U.S. 361, 401-402. *Interstate Commerce Commission* v. *Allen E. Kroblin, Inc.*, 113 F. Supp. 599 (D.C. Iowa 1953).[4]

The distinction between the requirements of an "investigation" and a "hearing" has received judicial recognition. *In re Securities and Exchange Commission*, 84 F. 2d 316, 318 (2d Cir. 1936). In *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 152, the Court held that a statutory direction to an administrative agency to "investigate" did not include the requirement of a formal hearing. See *Seatrain Lines v. United States, supra; In re Securities and Exchange Commission*, 84 F. 2d 316 (2nd Cir., 1936); *Woolley* v. *United States*, 97 F. 2d 258, 262 (9th Cir., 1938), cert. den. 305 U.S. 614; *Bowles* v. *Baer*, 142 F. 2d 787, 788-789 (7th Cir., 1944); *Genecov* v. *Federal Petroleum Board*, 146 F. 2d 596, 598 (5th Cir., 1945), cert. den. 324 U.S. 865; and *Jordan* v. *American Eagle Fire Insurance Co.*, 169 F. 2d 281, 285-287 (App. D.C., 1948). The *obiter* statement in *Dixie Carriers* v. *United*

[4] In 1924, a bill was introduced to amend section 4 of the Interstate Commerce Act, which would have provided for the substitution of the words "after public hearing", in lieu of the then and present words "after investigation." S. 2327, 68th Cong., 1st Sess. This bill was never enacted.

States, 143 F. Supp. 844 (S.D. Tex. 1956); *remanded as moot*, 355 U.S. 176, cannot be accepted. The statement in the *Dixie Carriers* case that an "investigation" under Section 4 shall include a "hearing" appears to be based upon *Louisville & N. R. Co.* v. *United States*, 225 F. 571, 580 (W.D. Ky., 1915), affm'd, 245 U.S. 463. The issue before the court in the *Louisville & Nashville* case was not whether a hearing is required in Fourth Section matters but rather did the evidence support the Commission's refusal to grant Fourth Section relief, and whether such action was deprivation of property without due process of law. The statement was made by the District Court as a "general observation", and on appeal the Supreme Court did not even mention the "general observation". *Louisville & N. R. Co.* v. *United States*, 245 U.S. 463.[5]

There is no warrant for suggesting, as appellants do (pp. 31-36) that the Commission may not enter an order

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[5] The rates for which fourth section relief was sought were in effect prior to enactment of the June 18, 1910 amendment to Section 4 of the Act, which required application to the Commission for relief from long-and-short-haul clause. To provide for such rates the June 18, 1910 amendment contained the proviso:

> "Provided further, that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after passage of this act, nor in any case where application shall have been filed before the Commission ... until a determination of such application by the Commission."

The effect of a denial of the authority was to require the carriers to make a change or modification in their existing rates, which the Commission can directly require only after a full hearing. See Interstate Commerce Act, Section 15 (1), 49 U.S.C. § 15(1). Under these circumstances, it may be that a hearing was necessary prior to an order which would have the effect of requiring the carriers to change then existing rates. Further, in fact, there had been a full formal hearing and the proceeding before the Commission included a formal complaint. See *Louisville & N. R. Co.* v. *United States*, *supra*, 465.

granting temporary Fourth Section relief after investigation and at the same time indicate that a formal hearing will be held to determine whether the relief should be made permanent. Section 4 of the Interstate Commerce Act contemplates primarily this type of action. That section states in part:

> "• • • That upon application to the Commission such common carrier may in special cases, after investigation, be authorized to charge less for longer than for shorter distances • • •; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section • • •."

As pointed out by the Court in *Skinner & Eddy Corp.* v. *United States, supra,* 567-568, "• • • Congress provided that the judgment of the Commission should be exercised 'from time to time' to determine 'the extent to which • • • [the] carrier may be relieved from the operation of this section.'"

Fourth Section Order 19059 (R. 14) stands as authority issued *after investigation* and in a special case. As the statute contemplates, the Commission may *from time to time* modify or discontinue the relief granted. The hearing ordered in Fourth Section Application No. 35140 relates to further investigation pursuant to the Commission's power to modify the form of the relief granted, or possibly to discontinue the relief. The statute clearly anticipates further investigation, *from time to time,* by the Commission after the issuance of orders granting Fourth Section relief.

Nor does the fact that the Commission entered into an investigation of "the lawfulness of the rates, charges, regulations and practices contained in" the rate schedules filed December 4, 1958, in any way affect the power of the

Commission to authorize Fourth Section departures. The "investigation" under Section 4(1) of the Act (49 U.S.C. § 4(1)) encompassed only whether a "special" case had been shown. The order of investigation and hearing, I.C.C. Docket No. 32790 (R. 20-21), is the exercise of the Commission's powers under Section 15(7) of the Act, 49 U.S.C. 15(7), encompassing the "lawfulness" of the rates. *Cf. United States* v. *Merchants & M. Traffic Association*, 242 U.S. 178.

Two other contentions made by appellants may be disposed of briefly. Appellants contend that the Fourth Section orders here at issue are invalid for the reason that they do not contain findings as allegedly required by Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 107(b)). However, Section 8 of that Act is expressly limited by its own terms to "cases in which a hearing is required to be conducted in conformity with Section 7," *i. e.*, only in instances in which there is a statutory requirement of a hearing. *American Trucking Ass'n* v. *United States*, 344 U.S. 298, 319-320. Hence since, as already stated, a hearing was not required, Section 8(b) of the Administrative Procedure Act has no application.

Appellants also contend that the action of the Commission in granting Fourth Section relief without a hearing denies them due process. The contention is clearly without merit. *United States* v. *Merchants & M. Traffic Ass'n*, 242 U.S. 178; *Seatrain Lines, Inc.* v. *United States*, 168 F. Supp. 819, 824 (S.D.N.Y. 1958). As pointed out in those cases, appellants may avail themselves of whatever constitutional right they might have to a formal hearing, either by process of a complaint filed pursuant to the provisions of Section 13(1) (49 U.S.C. § 13(1)), or in an investigation by the Commission pursuant to Section 15(7) (49 U.S.C. § 15(7)). There is plainly no constitutional requirement that the statute afford a party a right to a full hearing before the exercise of the Commission's

powers under Section 4(1). *Cf. Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 595; *Stoehr* v. *Wallace*, 255 U.S. 39; *American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306.

CONCLUSION.

Wherefore, the judgment of the district court dismissing appellants' complaint should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE.

I, Edward A. Kaier, one of the Attorneys for the Railroad Defendants-Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of October, 1961, I served *copies of the foregoing Brief* on the *several parties* to the case as follows:

1. A. L. Mechling Barge Lines, Inc., *et al,* Appellants, by mailing a copy, air mail postage prepaid, to their attorneys of record, Edward B. Hays and Wilbur S. Legg, 135 S. LaSalle Street, Chicago 3, Illinois.

2. United States of America, Appellees, by mailing copies, first-class postage prepaid, to the Solicitor General, Washington 25, D.C.; and W. Wallace Kirkpatrick and Richard A. Solomon, Department of Justice, Washington 25, D.C.

3. Interstate Commerce Commission, intervening defendant, by mailing copies, first-class postage prepaid, to Robert W. Ginnane, General Counsel, and H. Neil Garson, Associate General Counsel, Interstate Commerce Commission, Washington 25, D.C.

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APPENDIX.

(Statutes Involved.)

Interstate Commerce Act, Sec. 4(1), (49 U.S.C. § 4(1)):

"It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further,* That any such carrier or carriers operating over a circuitous line or route may, subject

only to the standards of lawfulness set forth in other provisions of this part or part III and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provisions of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice."

Interstate Commerce Act, Sec. 13(1), (49 U.S.C. § 13(1)):

"That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to

the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Administrative Procedure Act, Sec. 4(b), (5 U.S.C. § 1003(b)):

"PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection."